Trans-Tasman Co-operation in Civil Proceedings

The Australian Attorney-General and New Zealand Associate Justice Minister have recently announced that their respective governments will implement, by way of a bilateral treaty, the recommendations of the Trans-Tasman Working Group report on Court Proceedings and Regulatory Enforcement. That report was released in December 2006 and recommended that there be closer co-operation between the two countries in civil proceedings, especially as regards matters of jurisdiction and enforcement of judgments.

The Working Group's central recommendation was that a 'trans-Tasman regime', modelled on the *Service and Execution of Process Act 1992* (Cth), be introduced as between the two countries. The report went on to recommend that:

- The defendant's address for service could be in Australia or New Zealand, and parties in one country should be able to appear in court in the other by telephone or video link.
- The test for stay of proceedings should be on the basis that a court in the other country is the "more appropriate" court for the proceeding. This contrasts with the "clearly inappropriate" test for forum non conveniens that currently applies in Australia. Anti-suit injunctions will no longer be available as between Australia and New Zealand.
- Appropriate Australian and New Zealand courts should be given statutory authority to grant interim relief in support of proceedings in the other country's courts, such as Mareva and Anton Piller orders.
- A judgment from one country could be registered in the other. It would have the same force and effect, and could be enforced, as a judgment of the court where it is registered. Final non-money judgments such as injunctions will also be registrable.
- A judgment could only be refused enforcement in the other country on public policy grounds. Other grounds, such as breach of natural justice, would have to be raised with the original court. Currently, the grounds for non-enforcement of New Zealand judgments under the *Foreign Judgments Act 1991* (Cth) are wider.
- The common law rule that an Australian or New Zealand court will not

directly or indirectly enforce a foreign public law should not apply to the enforcement of judgments under the Trans-Tasman scheme. Thus, civil pecuniary penalties from one country should be enforceable in the other unless specifically excluded, and criminal fines imposed for certain regulatory offences in one country should be enforceable in the other in the same way as a civil judgment debt.

The proposals apply to *in personam* civil matters; actions *in rem* are excluded, as are matters covered by existing multilateral agreements such as those regarding the dissolution of marriage and enforcement of maintenance and child support obligations. The Working Group made no recommendation about the *Mozambique* rule as it applies to foreign land, preferring to leave this matter to independent domestic reform in the respective countries.

Note from the Luxembourg Delegation on Rome I Proposal

A note from the Luxembourg delegation on the Proposal for a Regulation on the law applicable to contractual obligations ("Rome I") which has appeared on the agenda for the Competitiveness Council meeting on 21 and 22 May 2007 deals rather critically with Article 5 of the planned regulation.

Here an excerpt:

> *The Luxembourg Government is very concerned about the negative impact on competitiveness of the instruments of private international law which are currently being converted into Community instruments. In particular, it would like to draw the attention of the Competitiveness Council to the proposal for a Regulation on the law applicable to contractual obligations ("Rome I", 6935/07), which is currently under discussion in the Justice and Home Affairs Council.*
>
> *Article 5 of the proposal has the effect, in certain cases, of depriving the parties of the freedom to choose the law applicable to business-to-consumer cross-*

border contracts. This changes the current situation under the Rome Convention, which lays down different protective rules and reflects a fair balance between the needs of businesses and those of consumers. This substantial change would have warranted an impact assessment by the Commission. However, the economic impact of this proposal has not been evaluated. Its consequences for the internal market and for consumers have not been analysed.

[…]

With a view to the Justice and Home Affairs Council meeting on 12 and 13 June 2007, it would be appropriate for the authorities concerned in all the Member States to be made aware of the negative consequences of this proposal for the internal market, for businesses and for European consumers. No decision should be taken which prejudices competition. In this context the Luxembourg delegation would recall the instruction given by the European Council in March 2003 that "the Competitiveness Council should be effectively consulted within the Council's decision-making processes on proposals considered likely to have substantial effects on competitiveness".

The complete note can be found here.

Many thanks to Dr. Jan von Hein, MPI Hamburg for the tip-off.

British Institute of International & Comparative Law Seeks New Director

The **British Institute of International & Comparative Law** (see information about the Institute here) is looking to **recruit a new Director**.

The Institute, the UK's leading centre for the advancement of the understanding

and practical application of international law, will celebrate its 50th Anniversary in 2008. The present Director, Professor Gillian Triggs, will be returning to Australia shortly to take up the post of Dean of the Law School at the University of Sydney, and the Institute is now seeking a dynamic individual with global vision as her successor.

The Institute, a community of legal scholars and practitioners, is an independent charitable body which seeks to support the international rule of law in global problem-solving, to foster a comparative understanding of all national legal systems, and to provide a forum for public debate on international law through its well-established research, events and publications, of which its best known is the International and Comparative Law Quarterly. The Institute's unique strength is to combine a diverse community of scholars with practitioners in the world's leading legal marketplace. It serves as an unrivalled focal point for its substantial membership.

Following a period of dramatic growth in the range and depth of its work, the Institute has consolidated its leading position and reputation. It aims to combine the highest standards of scholarship with a high degree of practical relevance for the world of the 21st century. The research staff of the Institute undertakes a wide range of work, including major research projects for a variety of government and private bodies, which seek to address
some of the key issues which have become of increasing public interest – such as the establishment of the rule of law in post-conflict states, international humanitarian law, international trade, the World Trade Organisation and global poverty, and evidence before international courts and tribunals.

The Institute's work ranges across public and private international law, comparative law, European law and human rights. Research is currently streamed into the following 3 programmes:

- International Law programme
- Law and Development programme
- European and Comparative Law programme

Within these programmes there are a number of specialist practitioner groups enabling the members of the Institute to discuss current issues at an expert level. The Director, who reports to the Board of Trustees, has overall responsibility for

the Institute's activities, including shaping its research programme and directing its research, managing its staff of some 30 academics, interns and administrators, and representing the Institute externally to government, the legal profession, corporations, non-governmental organisations and the public. In all probability the successful candidate will have a background in law, but could have experience in government, public bodies or other institutions. Candidates should feel comfortable representing the Institute in public and in the media, working with the Institute's Development Director in attracting major funding for its programmes, and have a proven record in managing people and organisations.

A competitive salary is offered, which, depending on age and experience, is likely to be at the upper end of the UK academic range. Written applications with full curriculum vitae and the names of three referees should be made in confidence to: Ruth Eldon, Institute Secretary, BIICL, 17 Russell Square, Charles Clore House, London WC1B 5JP. Tel. + 44 (0) 20 7862 5151. For further particulars e-mail: r.eldon@biicl.org. For more information on BIICL's activities see www.biicl.org. Applications should be received by **22 June 2007**. First interviews will be conducted shortly thereafter.

Diana Wallis on Rome II's Agreement: "A first – in many senses"

Following the agreement on a joint text of the Rome II Regulation reached in the first meeting of the Conciliation Committee, on 15 May (see our post here), Diana Wallis MEP, Rapporteur on Rome II in the European Parliament, has held a press conference to comment the successful outcome of the negotiations.

Excerpts from Mrs Wallis' statements have been published on her website and on the website of her political group, ALDE (Alliance of Liberals and Democrats for Europe):

Speaking after last night's Conciliation meeting between the three EU institutions to hammer out the final text on the Rome II Regulation (the law applicable to non-contractual obligations), the European Parliament's Rapporteur, Diana Wallis MEP, proclaimed it 'a first' – in many senses.

Diana Wallis said, "This is the first time that the EU has put into a Regulation an extensive area of private international law where there was previously no pre-existing international Convention. It is the first time that the European Parliament has had co-decision in this area of civil law – moreover certainly a first in terms of conciliation. Also, a new experience for all the institutions involved in the process – the European Parliament has left its clear mark on the final text agreed last night."

Diana Wallis was particularly pleased with the result on road traffic accidents, often involving personal injury – the most common and frequent form of tort (non-contractual obligation) that touches the lives of many citizens as they go about their business and leisure pursuits across Europe. She went to say, "The European Parliament has underlined the right of citizens to be fully reimbursed for their loss in such cases despite the national differences in compensation levels, whatever country they come from, whilst also extracting from the Commission a full study in the area by 2008 that 'would pave the way for a Green paper'."

"The European Parliament has also sought to introduce some further clarity into the fuzzy thinking as to the relationship between this Regulation relating to choice of law rules and other Internal Market instruments such as the e-commerce Directive. We have certainly ended in a better position than where we started from."

Diana Wallis welcomed the fact that the Conciliation was also instructive in bringing together three different Commission departments around the table to support the same text in relation to a number of issues. "This coherent joint working across the area of civil and commercial law is to be much welcomed and better late than never."

Finally Diana Wallis concluded that: "The European Parliament has left its imprint on several other issues, including party autonomy and flexibility to the general rule. It also insisted on several studies being undertaken by the

Commission, notably on defamation and the treatment of foreign law, which may leave the way open for future legislation."

Mrs Wallis' focus on the role of the European Parliament in drafting legislation in the field of judicial cooperation in civil matters has been stressed several times (on Rome II, see our posts here and here), and it is particularly meaningful since at present she is perhaps the most influential MEP involved in the legislative process of EC private international law instruments: she is shadow rapporteur, appointed by the ALDE group, for Rome I, and draftswoman on the maintenance regulation (see her Draft opinion on the Commission's proposal here).

As regards substantive law, she has been draftswoman for the Internal Market and Consumer Protection Committee (IMCO) for the opinion on the Commission Communication "European Contract Law and the revision of the acquis: the way forward", and has prepared for the JURI Committee a Draft report with recommendations to the Commission on limitation periods in cross-border disputes involving injuries and fatal accidents.

Conference: Conflict of Laws and Economic Regulation

Mathias Audit, Horatia Muir-Watt and Etienne Pataut are hosting a conference in Paris on 22 – 23 June 2007 on "**Conflict of Laws and Economic Regulation**" (*Colloque Conflit de Lois & Régulation économique*).

Speakers include Paul Lagarde (Paris I) and Diana Wallis (European Commission) – a full list of speakers, and all of the details on time, place and registration can be found in the programme (*PDF, 3mb*).

Article in Commemorance of Arthur Taylor von Mehren

An article by *Symeon C. Symeonides* (Willamette University College of Law, Salem, Oregon) on the life and work of A*rthur Taylor von Mehren*, who has passed away on January 16, 2006, has recently been published in English in the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (IPRax 2007, 261).

Here is a short excerpt:

> *As noted by his colleagues, Arthur was a "pure scholar", a "scholar's scholar", with "astonishing depth and range" and "a mind ever restless for new territory to explore." His published work spans the entire field of comparative law, both public and private, all branches of private international law (jurisdiction, choice of law, and recognition of judgments), as well as international commercial arbitration. He authored or co-authored 210 publications: ten books, four monographs, 119 articles, 48 book reviews (the most unselfish form of scholarship), and 29 reports and other writings. Most of them were published in English, but several were published in French and German, which Arthur spoke fluently, as well as in Spanish, Italian and Japanese.*

Rome II: Agreement Reached in the Conciliation Committee

As stated on press releases published by the Council and the Commission (DG Freedom, Security and Justice), **an agreement has been reached on the text of the Rome II Regulation, during the first official meeting of the Conciliation Committee that was held yesterday evening** (the Conciliation Committee had been convened, pursuant to Art. 251(3) of the EC Treaty, after the

formal rejection by the Council of the Parliament's Legislative resolution at second reading: for further details on the steps of the complex procedure that has lead to the agreement, see the Rome II section of our site).

According to a statement by Diana Wallis, Rapporteur on Rome II in the European Parliament, prior to the official meeting of yesterday **the institutions** involved in the codecision procedure (Council and Parliament, the Commission playing a mediating role) **had held six informal meetings** in order to facilitate the negotiations (so called "trialogues": for an overview of the conciliation stage, see the "codecision" section of the Commission's website).

The content of the agreement is summarized as follows in the Council's press release, with particular reference to the controversial issues (that were emphasized by the Commission in its opinion on the EP Second reading):

> *As a general rule, the draft Regulation sets out that the law applicable to a tort/delict is the law of the country where damage occurred. Only in certain limited, duly justified circumstances, the general rule will be derogated from and special rules applied. The draft Regulation contains special rules in matters of product liability, unfair competition, environmental damage, infringements of intellectual property and industrial action. In the context of a global compromise package, the Conciliation Committee settled all the questions arising from the amendments adopted by the European Parliament in second reading.*
>
> *The agreement includes notably:*
>
> ***Violation of privacy or rights relating to the personality:***
>
> *While it was agreed that legal actions connected with those rights will be excluded from the scope of this Regulation, the Commission was asked through a review clause to present, not later than 31 December 2008, a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights to relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media. Violations of privacy resulting from the handling of personal data will be also dealt with in the Commission's study.*
>
> ***Damages in personal injury cases:***

This question arises primarily in connection with traffic accidents which have connection with more than one State. In particular, the issue of the quantification of damages in personal injury cases was discussed. The solution agreed provides, on the one hand, for a recital with criteria for the quantification of damages to be applied by judicial authorities in accordance with national compensation rules. On the other hand, the Commission undertook to examine the specific problems resulting for EU residents involved in road traffic accidents in a Member State other than the Member State of their habitual residence and to prepare a study on all options before the end of 2008. This study would pave the way for a Green Paper.

Unfair competition and acts restricting free competition:

A compromise solution was found. It will allow for the application of one single law, while at the same time limiting, as far as possible, "forum shopping" by claimants.

Foreign law:

The Commission will prepare a study on the effects on the way in which foreign law is treated in the different jurisdictions and on the extent to which courts in the Member States apply foreign law in practice pursuant to this Regulation.

Other issues that were settled by the Conciliation Committee concern the relationship with other Community law instruments, the definition of environmental damage for the purposes of this Regulation, and a provision on punitive damages in the context of public policy.

The consolidated text resulting from the agreement (so called "joint text") is not yet available, subject to legal linguistic revision: however, **technical details on the joint text are provided by the statement released by Diana Wallis on her website**, with specific reference to the amendments adopted by the European Parliament at second reading on the basis of the Council's common position.

Once the linguistic revision completed, the Regulation shall be endorsed by the Parliament (absolute majority of votes cast) and the Council (qualified majority voting procedure) to be adopted, within six weeks from the date of approval of the

joint text, pursuant to Art. 251(5) of the EC Treaty: the Parliament's vote is scheduled in the plenary session of 10 July 2007 (see the OEIL page on Rome II).

It is entirely possible that the Regulation will be published in the Official Journal in July 2007 (following the Parliament's vote in plenary and the expected signature of its President and the Council's). If no change has been made to the provisions on the application in time, it will start to apply in early 2009 (see art. 32 of the Council's Common Position), to events giving rise to damage which occur after its entry into force (art. 31; the date of entry into force is on the twentieth day following that of the publication on the O.J., except otherwise specified).

(Many thanks to Andrew Dickinson and Janeen Carruthers for the tip-off, and to Martin George and Edouard Dirrig for providing additional information and clarifications)

Fraude à la loi

In a judgment of 17 April 2007, the Court of first instance of Hasselt found that the exception of fraude à la loi did not apply to the following case: A man from India and a woman from The Netherlands married in Sweden. They had no connection to that country (no friends or family; never lived there). The city where they moved to in Belgium refused to recognise their marriage on the basis of fraude à la loi (arguing that the couple should have married in The Netherlands or in Belgium, and only went to Sweden because of the less stringent requirements regarding documents etc.). The court found that this exception did not apply. In its considerations, the court mentioned that this was not a simulated marriage.

Legalisation attachments in Belgium

In Belgium a practice has developed whereby the Belgian embassies in foreign countries may attach a ‘warning’ when legalising a document. The most frequent example is for repudiation. The warning note will then indicate to the future receiver of the document that according to the embassy, the document concerns the unilateral dissolution of a divorce.

This practice has been affirmed in an ‘Arrêté royal’ (published in the Moniteur belge of 11 January 2007). In the past the warning could be inserted on the legalisation sticker or on a separate sheet of paper attached to the document and legalisation, but according to the new rules only the last option remains.

It seems that such warning is most often respected in practice. However, strictly speaking the warning is not legally binding, as it is the competence of the authority in Belgium where the document is presented to consider its content and whether it can be recognised.

MPI Comments on the Green Paper on the Attachment of Bank Accounts

The Max Planck Working Group has – besides the comments on Rome I (see our older post) – also elaborated “Comments on the European Commission’s Green Paper on Improving the Efficiency of the Enforcement of Judgments in the European Union: The Attachment of Bank Accounts”.

The comments can be found on the MPI’s website and will be published in the European Company and Financial Law Review (issue 2, 2007) in due course.

The Commission’s Green Paper (COM(2006) 618 final) can be found here.